

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
THOMAS NADLER,	:	
OFFICER OF OLIVER'S STORES, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1984	:	
through August 31, 1987.	:	

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DETERMINATION

In the Matter of the Petition	:
of	:
JOSEPH WOLFER,	:
OFFICER OF OLIVER'S STORES, INC.	:
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period September 1, 1984	:
through August 31, 1987.	:

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Petitioner Thomas Nadler, officer of Oliver's Stores, Inc., 782 Hemlock Court, Franklin Lakes, New Jersey 07417, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through August 31, 1987 (File No. 807312).

Petitioner Joseph Wolfer, officer of Oliver's Stores, Inc., 110 Eisenhower Drive, Cresskill, New Jersey 07626, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through August 31, 1987 (File No. 807314).

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, TwoWorld Trade Center, New York, New York, on February 28, 1991 at 3:00 P.M., with all briefs to be submitted by June 17, 1991. Petitioners appeared by Leon A. Kweit & Co., P.C. (Leon A. Kweit, C.P.A.). The Division of Taxation

appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

### ISSUE

Whether penalties and/or interest assessed against petitioners as persons required to collect and remit sales and use taxes on behalf of Oliver's Stores, Inc. should be reduced or abated.

### FINDINGS OF FACT

On November 4, 1987, the Division of Taxation issued to petitioner Thomas Nadler, as president of Oliver's Stores, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax due for the period September 1, 1984 through August 31, 1987 in the amount of \$142,884.05, plus penalty and interest. On the same date, the Division of Taxation also issued an identical notice of determination to petitioner Joseph Wolfer, as an officer of Oliver's Stores, Inc.

The foregoing notices assessed petitioners as persons required to collect and remit sales and use taxes on behalf of Oliver's Stores, Inc. for the period in question.

Oliver's Stores, Inc. ("Oliver's") was, during the period in question, engaged in the business of selling clothing at retail. Oliver's outlets included approximately 15 stores located in New York State. Petitioner Thomas Nadler was president of Oliver's, while petitioner Joseph Wolfer was an officer of such corporation (the office held by Mr. Wolfer was not specified in the record).

Oliver's was a privately-held corporation until approximately February 1986, at which time a public offering of the corporation's stock was made. Commencing shortly prior to the public offering and continuing thereafter for the period through the beginning of 1987, Oliver's was engaged in a fast-paced expansion, opening some 28 stores during such period. During this period of time, Oliver's hired a full-time controller to take charge of the financial aspects of the corporation, including tax reporting and the maintenance of books and records. During the same period of time, petitioner Joseph Wolfer was engaged in locating new store outlets and negotiating leases therefor, while petitioner Thomas Nadler was involved in purchasing

merchandise stock for each of the new stores.

On or about March 6, 1987, Oliver's filed for protection under Chapter 11 of the Bankruptcy Code. At some point thereafter, the Chapter 11 proceeding was converted to a Chapter 7 proceeding and Oliver's was liquidated. As a result of the bankruptcy proceedings and liquidation, Oliver's assets were converted to cash and the taxes in question here were paid. Therefore, only the imposition of penalty and interest against petitioners remains at issue in this proceeding.

Petitioners concede that they were persons required to collect and remit sales and use taxes on behalf of Oliver's pursuant to Tax Law §§ 1131(1) and 1133(a). Similarly, petitioners do not contest the dollar amount of the tax assessed and paid pursuant to the bankruptcy proceedings. However, petitioners do contest the imposition of penalty, seeking waiver of the same based upon an allegation that reasonable cause exists. Petitioners also request reduction or abatement of interest.

Neither petitioner appeared in person to provide testimony at hearing.

### SUMMARY OF PETITIONERS' POSITION

With respect to the issue of penalty abatement, petitioners allege that the rapid expansion of Oliver's business, and specifically their own involvement in finding new store locations and purchasing merchandise for stocking such new locations, diverted their attention from the financial aspects of the business and from focusing on the subject audit as it was ongoing. Petitioners also maintain that their extensive involvement in expansion endeavors, as described, coupled with the ultimate downturn of the business and resultant employee dismissals caused the records of the business to end up in a state of disarray. Petitioners note that the corporation's inability to provide records necessary for the conduct of a complete and detailed audit resulted in an audit calculation and determination of Oliver's tax liability based on estimates. Petitioners argue that, in fact, the amount of tax owed might have been less than that which was assessed and ultimately paid. In this regard, petitioners argue concomitantly that, were such the case, penalties and interest would in fact be lesser amounts than were assessed herein.

Petitioners also allege their belief that all taxes were timely paid during the period when Oliver's was privately held (i.e., prior to February 1986), and that after Oliver's stock was offered publically, petitioners believed all taxes continued to be timely paid and were unaware of any failures in payment by Oliver's then newly-hired controller. Thus, petitioners maintain that interest might be inappropriately assessed because if the corporation in fact paid taxes in a timely fashion, then no interest would have accrued in the first instance. Finally, petitioners note that once the filing in bankruptcy was made petitioners were precluded from paying the taxes assessed and thus were precluded from preventing interest from accruing. In short, petitioners allege they would have paid the taxes promptly post-audit but were precluded from doing so in view of the bankruptcy filing.

### CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) provides for the imposition of both penalty and interest for the failure to file a return or pay over any tax when due. In turn, Tax Law § 1145(a)(1)(iii)

provides that all of such penalty and that portion of interest which exceeds the minimum amount prescribed by law shall be waived if the taxpayer can establish that the failure or delay was due to reasonable cause and not due to willful neglect. However, the absence of willful neglect alone is not a sufficient ground for not imposing penalties and interest or for cancelling penalties and interest (20 NYCRR 536.5[a]).

B. The burden is on petitioners to prove that they fall within the standard allowing for the abatement of penalty and interest (see, Matter of Edward Yaeger and Patrick McKeon d/b/a California Brew Haus, Tax Appeals Tribunal, March 23, 1989). The Division of Taxation's regulations provide multiple, independent grounds upon which a finding of reasonable cause may be based for the abatement of penalties imposed under Tax Law § 1145(a)(1)(i) where clearly established (see, 20 NYCRR 536.5[c]). One of such grounds for reasonable cause provides:

"[a]ny...cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect.... Ignorance of the law, however, will not be considered as a basis for reasonable cause" (20 NYCRR 536.5[c][5]).

C. Petitioners herein have not established any basis sufficient to warrant waiver of the penalties or reduction of the interest imposed. In this regard, petitioners' arguments center on the allegations that they were busy or fully occupied with the demands of a rapidly expanding business, that for the period prior to the time the business went public they believed all taxes were timely and properly paid, and that after the business went public they believed Oliver's full-time controller complied with all filing and payment obligations. In fact, being "otherwise occupied" does not constitute any basis to excuse petitioners' failure to perform the obligations imposed under the Tax Law or to assure that such obligations were performed. Further, petitioners' belief that all taxes were timely paid remains entirely unproven.

Petitioners also argue that their lack of attention to the financial aspects of the business together with the demise of the business left Oliver's records in such a state of disarray that an accurate audit was impossible, thereby giving rise to estimated assessments which (although paid without contest) may have been higher than what was actually owed. Petitioners thus

maintain that any resulting penalty and interest should (or could) be lesser in amount. Hand in hand with such argument, petitioners allege that if it were not for the bankruptcy filing, any sums owed would have been promptly paid thereby minimizing, if not eliminating, the dollar amount of penalty and interest due. As to the first argument, there is no proof that the assessment was incorrect in any manner. Thus, the claim that the dollar amount may have been overstated as the result of audit estimates is dismissed as speculation. Similarly, the claim that any tax found to be due and owing would have been paid promptly by petitioners or by the corporation but for the bankruptcy filing also falls into the realm of speculative assertion. In sum, none of the arguments advanced by petitioners suffice to warrant waiver of the penalties or reduction of the interest imposed. Accordingly, such penalties and interest are sustained.

D. The petitions of Thomas Nadler and Joseph Wolfer, as officers of Oliver's Stores, Inc., are denied and the notices of determination and demands for payment of sales and use taxes due dated November 4, 1987 are sustained.

DATED: Troy, New York

6/20/91

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ADMINISTRATIVE LAW JUDGE